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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 832

EDWARD W. NELSON,

Petitioner,

—against—

MOORE-McCORMACK LINES, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

EUGENE UNDERWOOD
Counsel for Respondent

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Petitioner, lacking in frankness, fails to tell the Court the basic fact that his assignment to respondent's vessel was only temporary, pending the return of the regular radio operator who had left the job temporarily because of a death in his family. The District Court found:

> "The regular radio officer, because of whose absence libelant was temporarily assigned to the ship, had not as yet returned from his home on the west coast, and libelant was therefore cleared by his union for a coastwise trip lasting from October 25th to November 13, 1955 (27a).*

When the foreign voyage was terminated at New York on October 24 and all the crew except the petitioner signed

* Numbers with suffix (a) refer to petitioner's appendix in the Court of Appeals.

off the articles, petitioner was cleared by his union for the coastwise voyage only because the regular radio operator had not returned. However, as the District Court found:

> "On November 14th the regular radio man had returned and new articles were to be opened that day for a foreign voyage" (27a).

Therefore, it is quite apparent that petitioner lost his temporary job because the regular man, whose job it was, returned to the ship, and not because of any breach by respondent of its duties under the articles. Indeed, as the District Court said:

> "Libelant does not dispute the right of the vessel to terminate the voyage prior to the expiration of that *outside time limitation*, but only disputes the owner's right to terminate at a *place* different than that specified in the articles" (30a; italics ours).

All the District Court held was that, in a case where the seaman* does not deny the shipowner's right to terminate the articles *when* it did, but only *where*, and, since the seaman would have lost his temporary job anyway because of the return of the regular man, the seaman's only damages flowing from the shipowner's termination of the articles at a *wrong place* was the cost of transporting the seaman back to a *right place*.

This is especially so since the schedules in the union collective bargaining agreements provided for just that (27a).

The Court of Appeals, *per curiam*, held only that the District Court had rightly concluded that respondent in fact terminated the voyage in New York, and that peti-

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* It is of some significance that this petitioner was at that time a law student. He has since become a member of the bar.

tioner is entitled to no more by reason of respondent's breach

> "than the expenses of transportation (including wages and board for the travel time) to the west coast which appellee paid all the other members of the crew and offered to pay appellant" (Petition, p. 17).

No new rule of law has been laid down by either Court.

Petitioner cites no conflicting decision since the only issue is one of *quantum* of damages and petitioner lost no wages because he would have had to give up his job to the regular man in any event.

The cases cited by petitioner (p. 12) and others were amply distinguished by the District Court, as follows:

> "The other line of cases cited by libelant involve seamen's actions for wrongful discharge in which the measure of damages was held to be, *inter alia*, wages until the end of the voyage that continued subsequent to the discharge of the particular seaman. (Citing cases.) The distinction is that here the voyage was terminated as to the entire crew, all of whom were discharged. Wages until the end of the voyage in substance is what was offered and paid to all of them, except libelant who declined ultimately to accept it" (31a).

Concerning Penalty Wages

Petitioner, still lacking in frankness, claims that respondent refused to pay him his dues unless he signed a "general release". This is not true. The form he was asked to sign is a Government form of "mutual" release (17a).

This is a form which the Shipping Commissioner requires the master, as well as the seamen, to sign before payment of wages. The District Court said:

> "It was shown also that the mutual release that respondent required was the form that the shipping commissioner made seamen sign in the event they did not sign off of the articles themselves. We find as a fact that respondent was willing to accept such a release even with the 'under protest' notation and that payment was not therefore made conditional upon the waiver of any legal rights of libelant. * * * Libelant was not asked to waive a disputed claim" (33a).

The Court of Appeals said:

> "As appellant did not choose to comply with this customary and reasonable requirement, he cannot enforce the penalty" (Petition, p. 17).

It is only an arbitrary refusal to pay wages that gives rise to penalties. *McCrea* v. *United States*, 294 U. S. 23, 30. Neither court below attempted to change this established doctrine. The District Court held that petitioner's wages were always available to him if he would sign the Government form required by the Shipping Commissioner "under protest" and that "libelant was not asked to waive a disputed claim" (33a); *ergo*, the non-payment of wages was not arbitrary (32a-33a).

The Court of Appeals held only that:

> "Appellee was justified in refusing to pay so long as appellant refused to sign the customary mutual release. The record shows that the shipping commissioner advised appellant that he could reserve his right to contest his discharge by signing 'under protest,' and that appellee was willing to accept such a release. As appellant did not choose to comply with this customary and reasonable requirement, he cannot enforce the penalty" (Petition, p. 17).

No new law has been made. The case involves only a question of quantum of damages on a most unusual state of facts. This Court's attention is not merited and the petition should be denied.

Respectfully submitted,

EUGENE UNDERWOOD
Counsel for Respondent

Dated: New York, N. Y.
April 27, 1962